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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CAITLIN SOLES, Plaintiff and Appellant, v. JOE GONZALES et al., Defendants and Respondents.	B192288 (Los Angeles County Super. Ct. No. EC040669)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara Scheper, Judge. Affirmed.

Law Offices of Lance G. Greene and Lance G. Greene, for Plaintiff and Appellant.

Stafford & Associates, Timothy J. Stafford and Randal Oakley, for Defendant and Respondent.

Plaintiff and appellant Caitlin Soles appeals from the summary judgment against her and in favor of defendants and respondents Joe Gonzales, Barbara Gonzales and Caitlin Marie Swan, on appellant's complaint for damages arising out of injuries she suffered in a car accident.[1] Appellant contends summary judgment was improper because: (1) respondents should not have filed a combined motion; (2) the trial court erred in its evidentiary rulings; (3) there were triable issues of material fact; and (4) the relation back doctrine applied to negate application of the statute of limitations. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We recite the facts in accordance with usual rules on appeal. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

1. *The Accident*

Barbara Gonzales is Swan's mother; Joe Gonzales is Barbara Gonzales's husband and Swan's step-father. In 2003, Swan and Barbara Gonzales were the registered co-owners of a 1995 Volkswagen (the car). On April 13, 2003, Swan and appellant were close friends and appellant had been a passenger in the car on prior occasions. At about 12:50 p.m. that day, appellant was a passenger and Swan was driving the car south on Haskell when the front of Swan's car collided with the right side of the car Frank Hoffmann was driving west on Devonshire (the accident). Both Swan's and Hoffmann's vehicles were totaled. Appellant suffered no property damage but was "hurt very badly in the accident and was on prescribed medication for many days after the accident." According to the accident report, appellant complained of pain in her neck and had some cuts and abrasions.

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[1] We refer to Joe and Barbara Gonzales and Swan collectively as respondents.

Appellant was knocked unconscious during the accident; when she regained consciousness, she did not know what had happened but Swan told her that the other car ran a red light; appellant accepted as true this version of events and subsequently repeated it when asked by the police and others what had happened; in fact, appellant had no actual memory of what color the light was before Swan's car entered the intersection. According to the Traffic Collision Report of the accident, witnesses at the scene stated that it was Swan who ran the red light. The collision report indicated that the car was owned by Barbara Gonzales and identified Mercury Insurance as the insurer.

On April 15, 2003, appellant was interviewed by a representative of Mercury; the interview was recorded. According to the transcript of that interview, appellant stated that she believed the car was owned by Swan's mother, Barbara Gonzales. Appellant described the accident as follows: "it was our green light and we were going straight through. And before we even crossed the crosswalk, we see this huge car, truck, Bronco zooming through the intersection and she tried to stop. Before we even got through the crosswalk and he ended up not being able to stop and we collided. And I must have blacked out cause I don't remember. All I know is that when I came to, an off-duty paramedic had come over to make sure that we were okay. And help me out of the car." Appellant believed the other driver was at fault "because I know for a fact that it was a green light . . . ."

In a letter to Mercury dated August 21, 2003, appellant's former attorney, Richard Ramsay, demanded the policy limits in settlement of appellant's bodily injury claims arising out of the accident; the letter indicated that a copy of the collision report was enclosed. Subsequently, attorney Richard Sadeddin replaced Ramsay as appellant's attorney. Under cover of a letter to Sadeddin dated January 5, 2005, Mercury Insurance provided Sadeddin with a copy of appellant's recorded statement.[2]

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[2] Appellant objected to the trial court's consideration of this evidence, but the trial court declined to make express rulings on those objections. The result is that the objections were "impliedly overruled, the effect of which is that the objected-to evidence is in the record for purposes of appellate review." (*Demps v. San Francisco Housing*

2. *The Complaint and the Amended Complaints*

On April 7, 2005, a few days before the statute of limitations was to expire, Sadeddin filed a complaint for property damage and personal injury in which Joe Gonzales and Frank Hoffmann were the only named defendants; 10 Doe defendants were also named. The first cause of action alleged that the acts, which were the proximate cause of appellant's injuries, occurred on April 13, 2003 at Haskell Avenue in Los Angeles; Hoffmann operated the vehicle; Hoffmann owned the vehicle; Joe Gonzales entrusted the vehicle; and Joe Gonzales and Hoffmann were liable to appellant.

Without complying with the procedural requirements of Code of Civil Procedure section 474 for amending a complaint to replace a fictitious defendant with a named defendant, Sadeddin filed an amended complaint on July 20, 2005, which added Barbara Gonzales and Swan as named defendants (the July 20 complaint).[3] The July 20 complaint alleged that Hoffmann and Swan operated the vehicles; Hoffmann and Joe and Barbara Gonzales were the respective owners; Joe and Barbara Gonzales entrusted their vehicle to Swan; and that Hoffmann, Swan, and Joe and Barbara Gonzales were liable to appellant.

On August 31, 2005, after realizing that the date and place of the accident had been omitted from the July 20 complaint, Sadeddin filed a third pleading also captioned "First Amended Complaint" (the August 31 complaint). The August 31 complaint added the same date and place information that had been in the original complaint and the remaining allegations were identical to those of the July 20 complaint.

According to a notice of ruling from a September 13, 2005, case management status conference: "The Court noted that plaintiff's counsel had filed a First Amended Complaint in violation of Court Rules, without first seeking the Court's approval via

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Authority (2007) 149 Cal.App.4th 564, 566.) But, since counsel requested a ruling, the objections were preserved for appeal. (*Id*. at p. 579.)

3 All undesignated statutory references are to the Code of Civil Procedure.

motion. Moreover, the Court pointed out that said amended complaint had not been served on defendant Hoffmann and/or counsel. [¶] However, because plaintiff's counsel has advised he is dismissing defendant Hoffman from the instant matter, upon receipt of said dismissal, the Court, on its own motion, will grant plaintiff leave to amend and serve the related Gonzales defendants" (the September 13 Order). Hoffmann was subsequently dismissed from the action and the August 31 complaint was served on Barbara Gonzales and Swan. In November 2005, attorney Lance Greene replaced Sadeddin as appellant's attorney.

3. *Summary Judgment Pleadings*

Respondents moved for summary judgment in part on the ground that the action against Swan and Barbara Gonzales was barred by the applicable statute of limitations. Respondents' separate statement maintained that the following facts were undisputed: Appellant had the police report that identified Swan as the driver and Barbara Gonzales as the owner of the car (Undisputed Fact No. 8); and the July 20 complaint naming Swan and Barbara Gonzales as defendants was filed more than two years after the accident (Undisputed Fact No. 10). The motion was supported by declarations from each of the respondents, by appellant's discovery responses, and by the collision report.

Appellant opposed the motion on the grounds that (1) respondents were required to each file a separate motion for summary judgment; (2) because the September 13 Order gave appellant permission to file the August 31 complaint, the relation back doctrine applies. Appellant asserted the following additional facts as undisputed: the September 13 Order gave appellant leave to file the August 31 complaint; and her former attorney (Sadeddin) did not have a copy of the police report when he filed the original complaint. In supporting declarations, appellant averred that she believed Swan's version of events and that Joe Gonzales owned the car, and she did not have a copy of the collision report until December 2005, when her attorney (Greene) helped her with her discovery responses; Sadeddin averred that he did not have a copy of the collision report and relied on information obtained from appellant when he filed the original complaint.

In their reply papers, respondents disputed appellant's assertion that she did not know Swan was potentially liable and that Barbara Gonzales was the owner of the car, as well as Sadeddin's claim that he did not have a copy of the report when he filed the original complaint. Respondents' reply included a supplemental separate statement which referred to the following evidence that had not been included with the original motion: (1) the transcript of appellant's statement to Mercury; (2) the August 21, 2003, letter from Ramsay to Mercury; and (3) the January 5, 2005, letter from Mercury to Sadeddin.

4. *The Hearing*

At the hearing, appellant objected to the evidence submitted with respondents' reply papers on the grounds that it had not been included in respondents' original separate statement. Although the court's written tentative opinion referred to this evidence, the trial court stated that it had not considered it but declined to rule on the objections.

The trial court granted summary judgment, reasoning that the evidence established that appellant knew Swan was a potential defendant inasmuch any liability of Joe Gonzales's for negligent entrustment of the vehicle necessarily arose out of Swan's negligent operation of it and appellant's discovery responses establish that appellant knew Swan did not own the car.

Judgment in favor of respondents was entered on April 24, 2006 and notice of entry of judgment was served on May 4, 2006. On July 3, 2006, appellant filed a timely notice of appeal.

DISCUSSION

1. *Standard of Review*

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (§ 437c, subd. (c).) In reviewing an order granting summary judgment, we assume the role of the trial court and re-determine the merits of

the motion. In doing so, we must strictly scrutinize the moving party's papers. The declarations of the party opposing summary judgment, however, are liberally construed to determine the existence of triable issues of fact. All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment. While the appellate court must review a summary judgment motion by the same standards as the trial court, it must independently determine as a matter of law the construction and effect of the facts presented. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562.)

A defendant moving for summary judgment meets its burden of showing that there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subds. (o)(2), (p)(2).) If the defendant does so, the burden shifts back to the plaintiff to show that a triable issue of fact exists as to that cause of action or defense. A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. [Fn. omitted.]" (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850.)

2. *Respondents Did Not File an Improper Combined Motion*

Soles contends the judgment must be reversed because the three respondents "filed an improper combined motion, without, joinder and impermissibly failed to file individual separate statements of undisputed material facts." She argues that section 437c, subdivision (b) requires each party moving for summary judgment to file a separate statement of undisputed material fact; i.e., the statute precludes joint motions. Soles is incorrect.

Section 437c, subdivision (a) provides in part: "*Any party* may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Italics added.) Subdivision (b)(1) of states: "The motion shall be supported by affidavits, declarations, admissions, answers to

interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts which *the moving party* contends are undisputed." (Italics added.) Although the statute refers to "party" in the singular, there is nothing to suggest that the statute intended to preclude similarly situated parties from marshalling forces. It is not uncommon practice for parties to file joint motions. In fact, this is exactly what was done in the case relied upon by Soles, *Frazee v. Seely* (2002) 95 Cal.App.4th 627 (*Frazee*).

Soles's reliance on *Frazee* for the proposition that, where multiple defendants bring a joint motion for summary judgment, each defendant is required to file a separate statement of undisputed facts, is misplaced. There, the defect in the moving papers which prompted the Court of Appeal to reverse summary judgment was that nothing in the separate statement negated the liability of one of the several moving parties. (*Id.* at p. 636.) Notwithstanding some language suggesting the contrary, the court did not craft a blanket rule that one party may not join in another's separate statement if the statement otherwise supports the granting of summary judgment in favor of all parties who are relying on the statement. In our case, respondents collectively brought a single motion for summary judgment. Respondents' joint separate statement set forth facts tending to establish the statute of limitations defense and the vehicle ownership issue. All three respondents relied on the same separate statement and underlying evidence to support his or her respective position. This satisfied section 437c, subdivision (b).

3. *The Evidentiary Rulings*

Soles contends the trial court erred in not sustaining her objections to the evidence respondents submitted in their reply papers. This evidence consisted of the letters between Soles's attorneys and Mercury, and her recorded statement to the insurance company. She argues that, under *San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, this evidence was inadmissible because it was not referred to in respondents' original separate statement of facts. We find no error.

A motion for summary judgment must be supported by "a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed," followed by a reference to the supporting evidence. (§ 437c, subd. (b)(1).) The opposition must include a responsive separate statement also followed by a reference to the supporting evidence. (§ 437c, subd. (b)(2).) The statute authorizes the filing of a "reply to the opposition," but does not specify whether it may include a separate statement and additional evidence. (§ 437c, subd. (b)(4).)

Appellate courts have wrestled for some time with the question of whether new evidence can be offered in summary judgment reply papers. Colloquially, judges often cite the so-called "Golden Rule" of summary judgment which Justice Zebrowski has described as: "if it is not set forth in the separate statement, *it does not exist.*" (Zebrowski, *The Summary Adjudication Pyramid* (Nov. 1989) 12 L.A. Law. 28, 29.) There is case law support for that proposition. (See, e.g. *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, superseded by statute on other grounds as stated in *Certain Underwriters at Lloyd's of London v. Superior Court* (1997) 56 Cal.App.4th 952, 957, fn. 4.) More recent authority suggests the rule is not so shiny bright. (Compare *San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra,* 102 Cal.App.4th 308 [error to consider evidence offered for the first time in reply papers] with *Kulesa v. Castleberry* (1996) 47 Cal.App.4th 103, 112 [trial court must consider all papers].) We find persuasive the logic expressed in *San Diego Watercrafts, Inc.*: "Whether to consider evidence not referenced in the moving party's separate statement rests with the sound discretion of the trial court, and we review the decision to consider or not consider this evidence for an abuse of that discretion." (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra,* at p. 316; see also *Zimmerman, Rosenfeld, Gersh & Leeds, LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1478.) Factors the trial court should consider in exercising its discretion include the complexity of the facts in question, any effort to hide facts in voluminous papers, whether a new theory of the case is being advanced, and any due process concerns arising from the late filing. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, supra,* at p. 316.)

Here, the trial court did not abuse its discretion by considering evidence respondents submitted with their reply. The facts at issue were straightforward: statements Soles or her lawyer made or received dealing with the expiration of the statute of limitations. Soles was fully aware of the issues to be addressed in opposing the motion – whether, at the time the original complaint was filed, Swan and Barbara Gonzales should have been named as defendants because Swan was driving and Swan and Barbara Gonzales were the registered owners of the car. The additional evidence did not expand these issues. Soles was also aware of the evidence to be rebuffed – the Certificate of Title identifying Swan and Barbara Gonzales as the registered owners of the car and the collision report (produced by Soles in discovery) which indicated that witnesses at the scene stated that Swan ran a red light. The evidence respondents submitted to rebut Soles's claim of lack of knowledge was not hidden in a voluminous record; most were statements attributable to Soles. Finally, because the reply papers were served on Soles's attorney at least five days before the hearing (§ 437c, subd. (b)(4)), Soles had notice and an opportunity to respond to the challenged evidence. Soles did not dispute the veracity of the evidence; nor did she ask for a continuance to rebut it. Under these circumstances, the trial court did not abuse its discretion by considering the evidence submitted by respondents with their reply papers.[4]

4. *The Relation Back Doctrine*

Appellant contends that, under the relation-back doctrine, although Swan and Barbara Gonzales were not named as defendants until after the limitations period had expired, the August 31 complaint should be treated as a substitution of a new defendant for a fictitious Doe defendant under Code of Civil Procedure section 474. (See *Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176 (*Woo*).) She argues that the

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4 To the extent "rebuttal" evidence contained in reply papers simply contests the facts set out in the opposition papers, it is of little value as the new evidence likely will just create a triable issue of fact and the motion will be denied. This is not the point which appellants make.

September 13, 2005, ruling allowing appellant to file the August 31 complaint establishes that the trial court "determined to its satisfaction that [the August 31 complaint] relates back to the original complaint [and] that it was proper to add" Swan and Barbara Gonzales. We disagree.

"The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. A recognized exception to the general rule is the substitution under section 474 of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed." (*Woo, supra*, 75 Cal.App.4th at p. 176, citations omitted.) In *Woo*, the court noted two requirements for application of the relation-back doctrine: (1) the procedural requirement that the new defendant must be substituted for an existing fictitious Doe defendant; and (2) the substantive requirement that the plaintiff must be "genuinely ignorant" of the new defendant's identity at the time the original complaint was filed. (*Id*. at pp. 176-177.)

Woo held that noncompliance with the procedural requirement could be treated leniently, but not the substantive requirement. (*Ibid*.) Regarding the substantive requirement, the relevant inquiry is what facts the plaintiff actually knew at the time the original complaint was filed, not whether plaintiff might by the use of reasonable diligence have discovered the facts. (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170.)

In determining whether a plaintiff is genuinely ignorant of the relevant facts, information known by the plaintiff's attorney is imputed to the plaintiff. (Civ. Code, § 2332; 3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 99, p. 146-147.) Thus, if the undisputed evidence is that, at the time the original complaint was filed, either appellant or her attorney had actual knowledge of the identity of the later

named defendants and the facts that made them liable, the relation back doctrine is not available.

Here, arguably the September 13 ruling satisfies the procedural requirements of section 474 although at no time did plaintiff formally add Doe defendants. But plaintiff did not satisfy the substantive requirements as the undisputed evidence established that appellant certainly knew Swan and her mother, and was not genuinely ignorant of the facts that made the two women potentially liable.

With respect to Swan, the evidence is undisputed that appellant knew Swan was driving the car in which appellant was a passenger at the time of the accident. That appellant believed, at the time the original complaint was filed, that Swan's driving was the proximate cause of her injuries is established by the fact that appellant's theory of liability against Joe Gonzales in the original complaint was negligent entrustment. A cause of action for negligent entrustment rests " 'on a demonstration of knowing entrustment to an incompetent or dangerous driver with actual or constructive knowledge of his incompetence. [Citation.]' " (*Lindstrom v. Hertz Corp.* (2000) 81 Cal.App.4th 644, 648.) Since Joe Gonzales could not have been liable for negligent entrustment unless he knew Swan, the person to whom he allegedly entrusted his car, was an incompetent or dangerous driver, appellant must have believed that Swan was an incompetent or dangerous driver and caused the accident at the time the original complaint was filed. Thus, she had actual knowledge of the facts that made Swan potentially liable.[5]

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[5] At oral argument, appellant maintained that even if she knew Swan was potentially liable as a negligent driver at the time she filed the original complaint, she should nevertheless be allowed to add Swan as a Doe defendant under a different theory of liability the supporting facts of which she was ignorant. In other words, because at the time she filed the original complaint appellant did not know that Swan was a co-owner of the car and thus potentially liable as such without regard to her operation of the car (Veh. Code, § 17150 [vehicle owner liable for injury resulting from negligent operation of the vehicle by any person operating the vehicle with the owner's permission]), appellant should have been allowed to add Swan as a Doe defendant on that theory. But we need not resolve this issue given the state of the pleading. Whereas the amended July 20 and

With respect to Barbara Gonzales, the issue is: Did appellant know at the time the original complaint was filed that Barbara Gonzales was the owner of the car. Appellant's knowledge is demonstrated by her recorded statement in which she identifies Barbara Gonzales as the owner. Appellant's imputed knowledge of Swan's culpability through her attorneys is demonstrated by (1) the August 21, 2003, letter from appellant's former attorney to the insurance company enclosing a copy of the collision report, which indicates appellant's attorney had a copy of the report and (2) the January 5, 2005, letter from the insurance company to Sadeddin (the attorney who actually filed the complaint) which established that he received a transcript of appellant's statement months before filing the action. That appellant and Sadeddin deny seeing the collision report before the action was filed in April 2005 is irrelevant because her former attorneys had the collision report. As to ownership, respondents' separate statement refers to the Certificate of Title identifying Barbara Gonzales as the co-owner of the car. This evidence is ignored by plaintiff in her opposition. Soles's and Sadeddin's express denial that they saw the collision report, in light of their silence as to the Certificate of Title, creates the inference that they were aware of the Certificate of Title. Because the undisputed evidence established that appellant had knowledge of Swan's and Barbara Gonzales's identity as defendants and potential culpability when plaintiff filed the second complaint, appellant was statutorily barred from the relation-back doctrine.

5. *There Were No Disputed Issues of Material Fact*

Appellant contends the trial court erred in granting summary judgment because there were disputed issues of material fact relating to the statute of limitations defense. She argues that respondents "failed in their burden to prove that appellant was aware of

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August 31 complaints add an allegation that Joe and Barbara Gonzales are liable under this theory, neither alleges it as to Swan and appellant never requested that she be allowed to file an amended complaint to do so.

Caitlin Swan's liability and Barbara Gonzales's ownership interest in the vehicle." We disagree.

As we have already explained, the undisputed evidence establishes that, before the original complaint was filed, appellant and her attorneys had actual knowledge of the facts that would make Swan and Barbara Gonzales potentially liable, and the two parties were not named as defendants until after the limitations period had expired. Accordingly, summary judgment in respondents' favor was proper.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

WE CONCUR:

COOPER, P. J.

BOLAND, J.